Public Bank Bhd v Pan Pacific Asia Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D8–22–2235 OF 2000
ABDUL WAHAB SAID AHMAD J
31 MAY 2005

Banking — Banking and banking business — Overdraft facility — Claim for repayment — Contents of statement of claim — Whether bank only need plead balance outstanding under overdraft and interest charged

Civil Procedure — Summary judgment — Application to set aside — Whether valid and reasonable explanation of delay between filing of defence and plaintiff's application — Whether delay caused any prejudice to defendant — Whether there was a cause of action

Evidence — Collateral oral agreement — Allegation of collateral agreement, illegality and breach of public policy — Burden of party making allegations to prove

The plaintiff's claim against the defendant was for an amount arising out of an overdraft facility ('the facility') granted by the plaintiff to the defendant. Aletter of offer which the defendant accepted granted the facility. A resolution of the defendant's board of directors approving the acceptance was given to the plaintiff. The defendant failed to properly maintain the facility. The facility was allowed to exceed its approved overdraft limit. The plaintiff, through its solicitors, recalled the facility and demanded payment of the entire sum due and owing under the facility. The defendant failed to comply with the letter of demand and notice of recall. This was the defendant's appeal against the decision of the senior assistant registrar, granting the plaintiff's summary judgment application under O 14 of the Rules of High Court 1980.

Held, dismissing the appeal:

(1) The plaintiff had given a valid and reasonable explanation of the delay between the filing of the defence and the plaintiff's application, the acceptance of which would not cause any prejudice to the defendant (see para 8).

(2) A perusal of the statement of claim would show that there clearly was a cause of action. The statement of claim gave all the particulars of the facility, from the moment that it was offered to the defendant through the letter of offer right until the default, the letter of demand and the notice of recall (see para 11).

(3) In a claim for the amount due under an overdraft facility conducted under a current account, a plaintiff need only plead the balance outstanding under the overdraft and the interest for the time being charged. The plaintiff had included all this in its statement of claim (see para 11); *Bian Chiang Bank Bhd v Kwong Hing Cheong* [1978] 2 MLJ 193 and *Sundaram v Chew Choo Khoon* [1968] 2 MLJ 153 followed.

(4) On the existence of a collateral agreement, illegality and breach of public policy, the defendant bore of the burden of showing the existence of the alleged oral agreement. It was for the defendant to adduce evidence of the collateral agreement that the actual borrower of the defendant's overdraft was one Peninsula Securities Sdn Bhd ('Peninsula') and that the defendant was a mere agent of Peninsula, its sole function being merely to channel the defendant's overdraft to Peninsula (see para 16).

(5) The allegation of the existence of a collateral agreement was inconsistent with undisputed contemporaneous documents. There was not a single document that supports the existence of a collateral agreement between the defendant and Peninsula. The plaintiff had shown to the satisfaction of the court that Peninsula was a separate customer of the plaintiff and that it had been offered its own separate facilities under separate accounts from the defendant (see para 17).

[**Bahasa Malaysia summary**

Tuntutan plaintif terhadap defendan adalah untuk sejumlah wang yang timbul daripada kemudahan overdraf ('kemudahan tersebut') yang diberikan oleh plaintif kepada defendan. Sepucuk surat tawaran diterima oleh defendan apabila kemudahan diberikan. Satu resolusi lembaga pengarah defendan yang meluluskan penerimaan itu telah diberikan kepada plaintif. Defendan gagal untuk membayar kemudahan itu. Kemudahan itu dibenarkan melebihi had overdraf yang dibenarkan. Plaintif, melalui peguamcaranya, menarik balik kemudahan itu dan menuntut bayaran keseluruhan jumlah yang perlu dibayar dan tertunggak di bawah kemudahan itu. Defendan gagal untuk mematuhi surat tuntutan dan notis penarikan balik itu. Ini adalah rayuan defendan terhadap keputusan penolong kanan pendaftar, membenarkan permohonan penghakiman terus plaintif di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980.

Diputuskan, menolak rayuan tersebut:

(1) Plaintif telah memberikan penjelasan yang sah dan munasabah tentang kelewatan antara memfailkan pembelaan dan permohonan plaintif, penerimaan yang tidak akan menyebabkan apa-apa prejudis terhadap defendan (lihat perenggan 8).

(2) Penelitian terhadap pernyataan tuntutan jelas menunjukkan terdapat kausa tindakan. Pernyataan tuntutan memberikan semua butiran kenudahan itu, dari saat ia ditawarkan kepada defendan melalui surat tawaran tersebut sehingga kegagalan tersebut, surat tuntutan dan notis penarikbalikan (lihat perenggan 11).

(3) Dalam satu tuntutan untuk jumlah yang tertunggak dalam satu kemudahan overdraf di bawah akaun semasa, plaintif hanya perlu memplikan baki yang perlu dibayar di bawah overdraf dan faedah pada

masa ia dicajkan. Plaintif telah memasukkan semua ini dalam pernyataan tuntutannya (lihat perenggan 11); *Bian Chiang Bank Bhd v Kwong Hing Cheong* [1978] 2 MLJ 193 dan *Sundaram v Chew Choo Khoon* [1968] 2 MLJ 153 diikut.

(4) Berdasarkan perjanjian kolateral, kepenyalahan undang-undang dan perlanggaran polisi awam, defendan mempunyai beban untuk menunjukkan kewujudan perjanjian lisan yang dikatakan itu. Defendan hendaklah mengemukakan bukti tentang perjanjian kolateral itu bahawa peminjam sebenar overdraf defendan adalah Peninsula Securities Sdn Bhd ('Peninsula') dan defendan hanyalah ejen Peninsula, tugas utamanya semata-mata untuk menyalur overdraf defendan kepada Peninsula (lihat perenggan 16).

(5) Pengataan tentang kewujudan satu perjanjian kolateral adalah tidak konsisten dengan dokumen-dokumen semasa yang tidak dipertikaikan. Tiada satu pun dokumen yang menyokong kewujudan perjanjian kolateral antara defendan dan Peninsular. Plaintif telah menunjukkan kepada mahkamah bahawa Peninsular adalah pelanggan berasingan kepada plaintif dan bahawa ia telah ditawarkan kemudahannya yang berasingan di bawah akaun berasingan daripada defendan (lihat perenggan 17).

Notes

For cases on overdraft facility, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1741–1752.

For a case on application to set aside summary judgment, see 2(2) *Mallal's Digest* (4th Ed, 2002 Reissue) para 2871.

For a case on collateral oral agreement generally, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 637.

Cases referred to

American Express Europe Ltd v Mervyn Leroy Fishback [1993] MLJU 335 (refd)
Bian Chiang Bank Bhd v Kwong Hing Cheong [1978] 2 MLJ 193 (folld)
Krishnamurthy & Anor v Mayban Finance Corp Sdn Bhd [1986] 2 MLJ 134 (refd)
Perkapalan Shamelin Jaya Sdn Bhd & Anor v Alpine Bulk Transport New York [1997] 3 MLJ 818 (refd)
Perwira Habib Bank Malaysia Bhd v Fast Travel (M) Sdn Bhd & Ors [1988] 3 MLJ 210 (refd)
Sundaram v Chew Choo Khoon [1968] 2 MLJ 153 (folld)

Legislation referred to

Contracts Act 1950 s 75
Rules of the High Court 1980 O 14, O 18 r 7

Kumar Kanagesan (Yap Yon Han with him) (Lee Hishammuddin Allen & Gledhill) for the plaintiff.
PY Auyung (EL Teh with him) (Cheah Teh & Su) for the defendant.

Abdul Wahab Said Ahmad J:

[1] This is the defendant's appeal against the decision of the senior assistant registrar on 5 April 2004, granting the plaintiff's summary judgment application under O 14 of the Rules of High Court 1980.

[2] The plaintiff's claim against the defendant is for the amount of RM10,996.05 with interest of 3.5% above BLR arising out of an overdraft facility of RM10 million granted by the plaintiff to the defendant. A letter of offer dated 9 September 1996, which the defendant accepted on 13 September 1996, granted the facility. A resolution of the defendant's board of directors approving the acceptance was given to the plaintiff.

[3] The defendant failed to properly maintain the defendant's overdraft. The overdraft was allowed to exceed its approved limit of RM10 million. By a letter dated 18 January 2000, the plaintiff, through its solicitors, recalled the defendant's overdraft and demanded payment of the entire sum due and owing under the ddefendant's overdraft as at 2 February 2000. The defendant failed to comply with the letter of demand and notice of recall.

[4] On the first issue defendant's counsel contended that the delay between the filing of the defence and the plaintiff's application is sufficient ground to dismiss the plaintiff's application. The plaintiff's reply is that there is nothing in O 14 of the Rules of the High Court that says that a summary judgment application must fail if it is filed after the defence or on the ground of delay. According to the provisions of that order, the application can be dismissed where the defendant satisfies the court with respect to the claim, or part of the claim, to which the application relates that there is an issue or question in dispute which ought to be tried or there ought for some other reason be a trial of that claim or part.

[5] The plaintiff said that the defendant has not raised any triable issues. Therefore ordering a trial would serve no purpose. The plaintiff's learned counsel in his submission cited *Perkapalan Shamelin Jaya Sdn Bhd & Anor v Alpine Bulk Transport New York* [1997] 3 MLJ 818 where it was said that: 'For delay can surely provide no answer to an application made under O 14 of the Rules of High Court where there are no *bona fide* triable issues'.

[6] The plaintiff sought to distinguish the cases submitted by the defendant. In all those cases, the plaintiff did not give any reasons for the delay. The plaintiff does have a valid explanation. At the time the summary judgment application was filed, the defendant's appeal to the judge against the dismissal of its earlier application to set aside the amended writ was still pending. The appeal was disposed off on 26 September 2003, more than a year after the plaintiff had filed its application. The plaintiff's learned counsel said that in many cases, the court has accepted the plaintiff's explanation, so long as they are reasonable and no prejudice had been caused to the defendant.

[7] The defendant's learned counsel had taken great pains to bring to this court various authorities on this point. Even though many cases were cited by the defendant, I have read those authorities and I do not think that it is necessary to reproduce them here. The plaintiff has offered an explanation in that it was retrieving two separate files from its head office and branch in Johor Bahru. It required time and effort, hence the delay. The files had to be retrieved in view of the defendant's allegations that the facilities were actually granted to Peninsular Securities Sdn Bhd.

[8] I believe that the plaintiff had given a valid and reasonable explanation, the acceptance of which would not cause any prejudice to the defendant. Plaintiff's learned counsel went further and said that the issue of delay will be of no significance if at the end of the day the court finds that there are no issues that ought to be tried. Ordering a trial just on the ground that there is delay where all the other issues are not triable would serve no purpose.

[9] In our case, as I had accepted the explanation of the plaintiff given in their supporting affidavit and further affidavit, there was no need for me to consider situations where no explanation of delay made as propounded in *Krishnamurthy & Anor v Mayban Finance Corp Sdn Bhd* [1986] 2 MLJ 134.

[10] The second issue raised by the defendant is that the plaintiff has not disclosed any reasonable cause of action. The plaintiff invited the court to refer to the statement of claim and said that it discloses that the plaintiff does have a cause of action. This is because all the material facts are pleaded. Inrespect of a claim for the amount due under an overdraft facility conducted under a current account, a plaintiff need only plead the balance outstanding under the overdraft for the time being charged. The plaintiff said that the defendant had admitted that it executed the letter of offer. The defendant's overdraft was made available to the defendant through the plaintiff's current account. Therefore it follows that only the defendant would have access to it and would be the one making the drawdowns. Since the defendant was also given periodical statements of account and notices of variation in the rate of interest, it would have known of the outstanding sums and interest at all times.

[11] I do not agree with the defendant's learned counsel's submission that the plaintiff had not disclosed a reasonable cause of action. A perusal of the Statement of Claim would show that there clearly is a cause of action. The Statement of Claim gave all the particulars of the Facilities, from the moment that it was offered to the defendant through the Letter of Offer right until the default, the Letter of Demand and the Notice of Recall. The plaintiffs learned counsel submitted the correct proposition of law on this issue, as propounded in two authorities that he cited. The authorities are *Bian Chiang Bank Bhd v Kwong Hing Cheong* [1978] 2 MLJ 193 and *Sundaram v Chew Choo Khoon* [1968] 2 MLJ 153. In a claim for the amount due under an overdraft facility conducted under a current account, a plaintiff need only plead the balance outstanding

under the overdraft and the interest for the time being charged. The plaintiff had included all this in its statement of claim.

[12] I am satisfied that all the material facts had been pleaded and there is no way in which the defendant could validly complain that it did not know of the nature of claim against it. The plaintiff had pleaded that the defendant had accepted the letter of offer dated 9 September 1996 granting the overdraft by signing the acceptance at p 3. It was also pleaded that the defendant failed to regularize the account resulting in the plaintiff recalling the Facility and issuing a notice of demand. In its reply to the defendant's defence, the plaintiff had also stated that the defendant had provided a resolution of its board of directors dated 16 September 1996 approving the acceptance of the defendant's overdraft. It was also stated that a current account was opened in the defendant's name with the plaintiff's branch in Johor Bahru. It is through this account that the defendant drew upon and utilised the overdraft. The cases submitted by the defendant are distinguishable. In those cases the plaintiff failed to plead material facts to demonstrate a cause of action. It is not the case here. I am satisfied that the plaintiff had complied with O 18 r 7 RHC 1980 and pleaded all material facts to demonstrate a cause of action.

[13] The defendant's third issue is that the actual borrower was one Peninsula Securities Sdn Bhd ('Peninsula') and not the defendant. Further, the agreement was tainted with illegality and is in contravention of a public policy and therefore null and void and unenforceable.

[14] The plaintiff's learned counsel submitted that the allegation is inconsistent with undisputed contemporaneous documents. Peninsula was a separate customer of the plaintiff and it had been offered separate accounts from the defendant. Thus, since it was not raised earlier, the collateral agreement allegation is an afterthought.

[15] On the allegation that the defendant was a mere agent of Peninsula and that the defendant channeled the defendant's overdraft to Peninsula, the plaintiff said that there is no evidence either from the defendant or Peninsula to substantiate this. It was further submitted that the illegality allegation is untenable because there was no collateral contract and there were no restrictions on lending to the stockbroking industry. The money was utilised by the defendant. There is no correspondence at least on the allegation of the loan being provided for the use of Peninsula.

[16] On the existence of a collateral agreement, illegality and breach of public policy, the third issue brought up by the defendant, I agree that the defendant bears of the burden of showing the existence of the alleged oral agreement. It is for the defendant to adduce evidence of the collateral agreement that the actual borrower of the defendant's overdraft is one Peninsula Securities Sdn Bhd and that the defendant was a mere agent of Peninsula, its sole function being merely to channel the defendant's overdraft to Peninsula.

[17] I find that the allegation of the existence of a collateral agreement is inconsistent with undisputed contemporaneous documents. There is not a single document that supports the existence of a collateral agreement between the defendant and Peninsula. The plaintiff had shown to the satisfaction of the court that Peninsula was a separate customer of the plaintiff and that it had been offered its own separate facilities under separate accounts from the defendant. The plaintiff had offered an overdraft of RM20,000 vide letter of offer dated 17 June 1996, Peninsula did not accept this offer. Then there was a second offer on 9 August 1996 of banking facilities totaling RM20,000, which Peninsula accepted on or around 23 August 1996. The plaintiff however subsequently cancelled it.

[18] The defendant tried to rationalise its contention that the facilities had to be channeled to Peninsula through the defendant by saying that there are restrictions for the plaintiff in granting facilities to stockbroking companies. I see no evidence of such a restriction. The documentary evidence showed that the plaintiff had granted the facilities directly to Peninsula.

[19] To sum up, the defendant has failed to come forth with evidence like documents, memos, agreements and correspondences to show that there was such a collateral agreement. I therefore hold that since there was no collateral contract and that there were no restrictions on lending to the stockbroking industry, the defendant's contention that the letter of offer and the defendant's negative pledge are tainted with illegality is untenable.

[20] The fourth issue of the defendant is that it did not receive any demands. The letter of demand and the notice to recall were sent to the defendants at Suite 6.2, Level 6, Menara Pelangi, Jalan Kuning, Taman Pelangi, 80400 Johor Bahru. This address was stated as the defendant's registered address in the defendant's 11 February 2000 affidavit.

[21] The letter of demand and the notice to recall, issued on 18 January 2000 and 10 February 2000 as exhibited were issued to the defendant's address then at Suit 6.2, Level 6, Menara Pelangi, Jalan Kuning, Taman Pelangi, 80400 Johor Bahru. The plaintiffs own deponent, Datuk Phillip, said that until 11February 2000, the defendant's registered address was the above Menara Pelangi address. Therefore this issue is also untenable.

[22] The defendant's fifth issue is that the plaintiff's demand for interest is misconceived, excessive and unenforceable. The plaintiff, in answer to this referred to para 1(a) of the letter of offer, which provides that the plaintiff is entitled to 'revise/vary interest rates and other charges on the facility from time to time at the bank's absolute discretion'. There is no express provision that notice must be given of revision or variation in the rate of interest. Nevertheless, the plaintiff did issue notices of the variation/revision of the rate of interest to the defendant, the last being 11 November 1999. The defendant had never raised any objections to the rate of interest, despite it being clearly

stipulated in the Statement of Accounts. In *Perwira Habib Bank Malaysia Bhd v Fast Travel (M) Sdn Bhd & Ors* [1988] 3 MLJ 210 Siti Norma Yaacob J (as she then was) said:

> The two rates of interest, claimed at 9% and 16.5% pa are the agreed and permissible rates of interest under the letter of offer dated 12 June 1984 as the first defendant had also permitted the plaintiff at its discretion, to raise the interest from 9% to 16.5% ps under the letter of offer.

[23] I observe that there is no express provision that the plaintiff must give notice of any revision or variation in interest rates. What is present is para 1(a) of appendix (iii) to the letter of offer, which provided that the plaintiff would be entitled to 'revise/vary the interest rates and other charges on the facility from time to time at the bank's absolute discretion.

[24] Nevertheless, the plaintiff still issued notices to the defendant of the variation of revision of the rate of interest. There was no evidence that the defendant had raised any objections to the rate of interest. The authorities submitted by the defendant are different in that the contracts in those cases expressly stipulate that prior written notice is required of any variation in interest rate. No such prior notice is stipulated in the present case.

[25] The sixth issue raised is that the plaintiff's demand is excessive. The plaintiff's reply to this is that the 1% interest that the plaintiff imposed is not caught by s 75 as it is not in any way exorbitant. The rate of interest of 3.5% above BLR is also not exorbitant. The plaintiff said that the correct rate of interest is stated in the demands.

[26] I do not think that the additional interest of 1% ps above the prevailing rate chargeable on any amount exceeding the operative limit is a penalty and is excessive. 1% above the prevailing rate is certainly not exorbitant, to be caught by s 75 of the Contracts Act 1950. Nevertheless, the additional interest of 1% p.a. chargeable on any amount exceeding the Overdraft Limit is agreed upon. The same applies to the defendant's contention that the rate of interest of 3.5% + BLR is exorbitant. The charging of the 1% default interest on outstanding sum exceeding the operative limit is standard banking practice and agreed upon by defendant. There is no issue of penalty or excessiveness here. I take judicial notice that 3.5% + BLR is definitely a competitive rate which is not exorbitant. The plaintiff had stated the correct rate of interest in the demands. Hence, the defendant's contention that the demands were excessive is misguided.

[27] The defendant finally contended that as the principal sum and interest are disputed, unconditional leave to defend ought to be granted. Learned counsel for defendant went on to say that as long as there is a plausible dispute or reasonable ground for enquiry or account in order to ascertain the amount recoverable, the court should not allow judgment to be signed. The statement of accounts had been rendered to the defendant and he had never

raised any query on the amounts due. Defendant had not condescended to particulars of error in the computation of the principal sum or the interest. He is now estopped from disputing those figures (see *American Express Europe Ltd v Mervyn Leroy Fishback* [1993] MLJU 335). Plaintiff had substantiated its claim by documentary evidence.

[28] I am satisfied that there are no *bona fide* triable issues or that for some other reasons that the matter should proceed to trial. In those circumstances, the summary judgment with costs granted to the plaintiff by the learned senior assistant registrar is affirmed and the defendant's appeal is hereby dismissed with costs.

Defendant's appeal dismissed with costs.

Reported by Peter Ling